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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 782

COLONIAL MILLING COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the United States Processing Tax Board of Review, together with a dissenting opinion (R. 68–97), are unreported. The opinion of the Circuit Court of Appeals (R. 276–283) is reported at 132 F. 2d 505.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1942 (R. 275). Petition for a writ of certiorari was filed March 3, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Processing Tax Board of Review erred in holding that the taxpayer had failed to show that it had borne the burden of the processing taxes in controversy.

STATUTE INVOLVED

The pertinent provisions of the Revenue Act of 1936 are contained in the Appendix, *infra*, pp. 11–21.

STATEMENT

This proceeding was instituted before the United States Processing Tax Board of Review to review the Commissioner's disallowance of a claim for refund of $108,518.20 paid as processing taxes under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, for the period from July 9, 1933, to March 31, 1935, inclusive, upon the first domestic processing of wheat (R. 4–9, 11–25, 45–59, 65–66). The claim for refund was rejected in full by the Commissioner of Internal Revenue on May 7, 1940, on the ground that the taxpayer had failed to show that it had borne the burden of any part of the amount claimed (R. 27–40, 66).

The case was tried on its merits before the Processing Tax Board of Review. On the basis of a stipulation (R. 64–67) and the evidence before it the Board made findings of fact (R. 68–71) which may be summarized as follows:

The petitioner corporation was engaged in the milling of wheat, and had paid processing taxes

in the aggregate amount of $237,167.34 for the period July 9, 1933, to March 31, 1935 (R. 68). It filed claim for refund in the amount of some $240,000, but thereafter amended its claim so as to reduce the amount sought to $108,518.20. The Commissioner disallowed in full both the original and amended claim. (R. 69.)

The total cost of all the wheat processed during the period in question (consisting of 790,645 bushels), was $854,215.99, and the total gross sales value [1] of that wheat, with respect to which processing taxes had been paid, was $1,430,264.39 (R. 69).

During the statutory period before and after the tax, July 9, 1931, to July 8, 1933, and February 1, 1936, to July 31, 1936 (as defined in Section 907 (c) of the Revenue Act of 1936, Appendix, *infra,* pp. 18–19), petitioner processed 1,301,817 bushels at a total cost of $1,059,577.21, the total gross sales value of which was $1,552,146.75 (R. 70).

The Board finally found that (R. 70–71):

> 12. * * * Beginning July 9, 1933, the effective date of the processing tax upon the processing of wheat, petitioner had on hand certain orders for flour which had not been shipped. With respect to the sales prices on these orders, it added $1.38 per barrel of flour to the price on account of the processing tax. With respect to all orders received and sales made after the process-

[1] "Gross sales value" is defined in Section 907 (b) (6), *infra*, p. 17, and is an essential factor in computing the average margin under Section 907 (b) (1) and (2), *infra*, p. 16.

ing tax went into effect, petitioner added the tax into its price computation and attempted to sell the flour at a price sufficient to get the tax back. Petitioner sold its flour in competition for what it could get at prices that would vary from day to day and would vary with respect to sales to different customers on the same day.

13. The average margin per unit of the commodity processed was not lower during the tax period than the average margin was during the period before and after the tax.

14. None of the burden of the amount paid or collected as processing tax was borne by petitioner, but such burden was shifted to others.

The Board accordingly ruled that the taxpayer was not entitled to any part of the amount paid by it as processing tax, two members dissenting (R. 71). The court below affirmed (R. 275).

ARGUMENT

This case turns upon its own facts; it was correctly decided below upon the basis of adequately supported findings, and does not call for further review.

The Board found (R.70) that the taxpayer added the tax to *all* unfilled orders on hand when the tax was first imposed; and that the tax was added in the price of *all* sales made during the tax period. The Board also found (R. 71) that the average margin (computed in accord with Section

907 (b), *infra,* pp. 16–18) was such as to make applicable against the taxpayer the presumption of Section 907 (a); and in this connection the Board found that the taxpayer had failed to rebut that presumption. The taxpayer asserts, however, that as to some sales it was unable, by reason of competition, to obtain a price sufficient to meet all costs, including the tax, plus an assumed reasonable profit of twenty-five cents a barrel, and that from such a showing (Br. 20):

> * * * it automatically follows as a matter of course that petitioner is entitled to recover the tax paid with respect to the bushels of wheat contained in these respective sales * * *.

The taxpayer conceded that other sales were profitable and that the tax there involved was passed on. No showing was made as to the profit actually realized on those sales. The court below properly concluded that (R. 281) since the statutory basis for the claim here contemplates consideration of the period *as a whole,* the taxpayer was not warranted in segregating transactions favorable to its claim.[2] In view of the presumption

[2] Section 902 (a) (Appendix, *infra*) provided that the taxpayer should be denied refund if the tax was included in the price of "any article processed from any commodity" subject to the tax, or was shifted "in any manner whatsoever." Section 903 (Appendix, *infra*) authorized regulations requiring that claims cover the entire tax period. Section 907 (a) contemplated the consideration of all transactions in com-

arising from the margin computation based upon figures covering the entire tax period, the court below correctly observed that (R. 281) the evidence introduced by the taxpayer in rebuttal was insufficient since a consideration of all sales might well have indicated, as did the presumption, that the tax burden was actually shifted.[3]

The taxpayer further asserts (Br. 16) that the presumption was rebutted by the fact that the

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puting the average margin, and Section 907 (b) (4) specified that where there was a combination of commodities, the average margins shall be established "with respect to such commodities as a group, and not individually." Section 907 (e) (2) authorized the Commissioner to look to related transactions and rely upon the average margin if he had reason to believe that the burden of the tax was shifted by means of such related transactions.

[3] The refund statute did not guarantee operations at a profit. The standard prescribed is a comparative one. The statute was directed at the effect of the tax on the established practice of the taxpayer. Irrespective of the margin of profit on a particular individual transaction, the tax could not be recovered if it was reflected in the price charged for the product. The tax here was in fact added to the sale price of the flour and consideration of the tax period as a whole showed that the taxpayer realized a substantial profit after recovering all costs, including the processing tax; whereas in the preceding six years, it had failed to realize such a profit. That the taxpayer chose to make some sales at a nominal profit is no indication that the tax was not included in the price actually realized. Manufacturers often make drastic price concessions on wholesale lots in order to maintain volume production, making up for the diminished or nonexistent profits by the more generous profits inherent in other sales. This is a matter of business management and trade economics and has little or no bearing upon the issue here involved.

base period was abnormal by reason of large nonrecurring losses sustained in closing out its retail stores. This has no direct bearing on the issue here presented. In the first place, the margin computation upon which the presumption is based deals directly with the cost and sales value of the commodity processed, and not with the net income of the taxpayer for normal income tax purposes. In the second place, the court below correctly concluded that (R. 279) the Board was not satisfied with the sufficiency of the evidence on this point. The taxpayer had suffered losses in every prior year and it did not appear from the evidence that the nonrecurring losses occurred in the particular base period years.[4]

There is no conflict with the principles enunciated in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. The court below specifically recognized the rule announced in the above decision that (R. 280) the presumption of the statute is rebuttable, and proceeded to consider the evidence submitted by the taxpayer. The court concluded that by reason of the failure of the taxpayer to present all the available evidence, the Board was warranted in

[4] The taxpayer's attack (Br. 18–19) on the reasonableness of the base period fixed in the statute is a matter that should be addressed to Congress rather than to the courts. The general validity of the statute was upheld in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

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concluding that the presumption had not been rebutted. In the *Anniston* case, this Court pointed out that under the statutory procedure, the duty rested upon the claimant to (p. 352) "present fully all the facts pertaining to the question of the shifting of the burden of the tax." By reason of the deliberate segregation of favorable transactions and the withholding of evidence as to other transactions in the tax period, the taxpayer failed to meet the above requirement.

The other decisions of this Court, relied upon by the taxpayer (Pet. 5), furnish no basis for the issuance of the writ. In *Wilson & Co.* v. *United States,* 311 U. S. 104, this Court merely ruled that the Court of Claims had no jurisdiction under the circumstances there presented. In *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, this Court was concerned with a different statute, and the problems here involved were not there presented. In that case, this Court pointed out that it was not within the province of the appellate court to reexamine the evidence and reverse the judgment because of what it regarded as an error of fact.

There is no conflict between the decision below and *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. 2d 530 (C. C. A. 7th), and *Regensburg & Sons* v. *Helvering,* 130 F. 2d 507 (C. C. A. 2d), as asserted by the taxpayer. (Pet. 6.) In the latter case, the increased income reflected in the margin

computation for the tax period was explained by the increased production costs rather than the addition of the tax. There was also evidence of other special factors undermining the presumption, such as a higher yield from the commodity by reason of improved methods and the fact that the tax period embraced two Christmas selling seasons. In the *Cones* case, the presumption resulting from the margin computation was explained by the increased replacement price or value of the material when the tax was imposed. The tax there involved was a floor stock tax on cotton goods which the taxpayer had on hand for some time and as to which the general market had, in the meantime, advanced considerably. Increased labor costs were also involved in that case. Compare the subsequent decision of the same court in *Cudahy Packing Co.* v. *United States,* 126 F. 2d 429 (C. C. A. 7th). Cases of this kind necessarily turn on their own facts and no basis for certiorari is shown by the circumstance that different results were reached upon wholly different facts. Cf. *Honorbilt Products, Inc.* v. *Commissioner,* 119 F. 2d 797 (C. C. A. 3d); *United States* v. *H. T. Poindexter & Sons Mer. Co.,* 128 F. 2d 992 (C. C. A. 8th), certiorari denied, November 9, 1942, No. 431, this Term; and *Williams* v. *United States,* (C. Cls.) decided February 1, 1943 (1943 C. C. H., par. 9263).

CONCLUSION

There is no conflict of decisions. The decision below is correct. The petition for writ of certiorari should be denied.

Respectfully submitted.

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